

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

DANIEL HORACEK,

Plaintiff,

Case No. 07-13822

vs.

Avern Cohn  
United States District Judge

DERRICK WILSON, *et al*,

Michael Hluchaniuk  
United States Magistrate Judge

Defendants.

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**ORDER SETTING ASIDE ENTRY OF DEFAULT, ORDERING  
SERVICE BY U.S. MARSHAL SERVICE, AND HOLDING  
MOTION FOR DEFAULT JUDGMENT IN ABEYANCE**

On August 20, 2008, plaintiff filed a request for the clerk to enter a default against defendant Derrick Wilson. (Dkt. 58). In his request, plaintiff asked the Court to serve his request on defendant Wilson because his address is sealed at this time. (Dkt. 58). Rather than serving the request for entry of default, the Clerk's Office entered the default on the same date. (Dkt. 59). On August 25, 2008, plaintiff moved for entry of default judgment against defendant Wilson. (Dkt. 60).

Unless and until a party has been defaulted, Rule 5(a) requires the service of every pleading filed after the original complaint and the service of all written notices, appearances, demands, offers of judgment, or "other similar paper[s]."

Fed.R.Civ.P. 5(a). There is no dispute that the request for entry of default was not served on defendant Wilson. Thus, the Court sets aside the clerk's entry of default. *Simmons v. Ohio Civil Service Emp. Assoc.*, 259 F.Supp.2d 677, 686 (S.D. Ohio 2003) (A default is properly set aside where the motion for default and other pleadings were not served on the parties in accordance with Rule 5(a).).

For the foregoing reasons, the Court sets aside the entry of default, orders that defendant Wilson be served with this Order and with plaintiff's request for entry of default by the U.S. Marshal's Service forthwith. The Court further orders that plaintiff's motion for default judgment be held in abeyance pending the proper entry of a default, following service of the request on defendant Wilson, in compliance with Federal Rule 55(a)<sup>1</sup> and Local Rule 55.1.<sup>2</sup>

**IT IS ORDERED.**

The parties to this action may object to and seek review of this Order, but are

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<sup>1</sup> Fed.R.Civ.P. 55(a) mandated that a default may only be entered *if* the defendant has failed to answer or otherwise defend. Thus, if defendant Wilson answers or otherwise defends before plaintiff properly requests entry of default or before the Clerk properly enters the default, no default may be entered.

<sup>2</sup> Local Rule 55.1 mandates that an affidavit setting forth the following is required: (a) the identity of the defendant in default; (b) a statement attesting to the date the summons and complaint were served on the defendant who is in default; and (c) a statement indicating the manner of service and the location where the defendant was served.

required to file any objections within 10 days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and Local Rule 72.1(d)(2). A party may not thereafter assign as error any defect in this Order to which timely objection was not made. Fed.R.Civ.P. 72(a). Any objections are required to specify the part of the Order to which the party objects and state the basis of the objection. Pursuant to Local Rule 72.1(d)(2), any objections must be served on this Magistrate Judge.

Date: August 28, 2008

s/Michael Hluchaniuk  
Michael Hluchaniuk  
United States Magistrate Judge

### **CERTIFICATE OF SERVICE**

I hereby certify that on August 28, 2008, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send electronic notification to the following: Rick J. Patterson and Steven M. Potter and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: Daniel Horacek, # 218347, 951 Indianwood Road, Lake Orion, MI 48362.

s/James P. Peltier  
Courtroom Deputy Clerk  
U.S. District Court  
600 Church Street  
Flint, MI 48502  
(810) 341-7850  
pete\_peltier@mied.uscourts.gov